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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 634

LINUS PAULING,

Petitioner,

v.

NEWS SYNDICATE CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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POINT I

The court below overextended *New York Times* v. *Sullivan*,* requiring this Court to speak on the rights of a private citizen to sue for libel.

Since the filing of the within petition for certiorari and on November 23, 1964, this Court decided *Garrison* v. *Louisiana*, —— U. S. ——, involving criminal rather than

* 376 U. S. 254 (1964).

civil libel. This Court there extended the doctrine of *New York Times* v. *Sullivan,* to apply to a criminal prosecution for libel and in so doing re-examined the areas of libel law in conjunction with the First and Fourteenth Amendments. It there held that an action for criminal libel will not lie against a defendant for criticism of a public official in the absence of malice (a reckless disregard for the truth).

Now the question most certainly arises as to whether or not the same principles apply to the rights of an individual, not a public official, who speaks out on matters of public importance and whose reputation is thereafter impugned.

Respondent in his brief in opposition (R. 13)* asserts that the language of the court below in invoking *New York Times* v. *Sullivan,* was mere *dicta* and therefore not subject to review by this Court. And in truth, the court below states, "It suffices for our decision here that Dr. Pauling's case was properly submitted to the jury under pre-New York Times law" (P. 43). As developed, however, in the petition herein, the court below has summoned its theory of "privileged facts" out of a misconception of the meaning of privilege in libel law (P. 9-18).

The court below in effect held that so long as the plaintiff has taken public positions, *New York Times* v. *Sullivan* extended, protects publication of statements about him which may or may not be true, as based on "privileged facts".

We suggest that this Court did not intend to so narrow the area of libel under the Constitution. To date the Court has not specifically distinguished between the criticism of a public official acting in his official capacity and that of a private citizen concerned with public affairs.

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* Respondent's Brief in opposition will be referred to as "R.", followed by page number. The Petition will be referred to as "P.", followed by page number.

In *Garrison*, it said:

> "In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."

This language squarely raises the question of whether or not private reputation is subordinate if the person criticized is *not* a public official.

If indeed, a rich and influential newspaper has *carte blanche* to falsify the views of a private citizen because the citizen has the temerity to advance his opinions as to nuclear testing or the like, freedom of expression is not fostered. If the law permits lies to be widely disseminated in the press without recourse or remedy, about persons with unpopular or unorthodox views, the expression of such views will be discouraged. Such a rule "will sanctify the powerful and silence debate."*

POINT II

The court below confused the defense of privilege based on a privileged relationship or situation and fair comment on facts truly stated in contravention of New York Law.

Respondent protests petitioner's "irrelevant" reference to § 74 of the New York Civil Rights Law (formerly § 337 of the Civil Practice Act)** on the ground that there was "no defense founded on this statute which deals with fair and true reports of judicial, legislative or official proceedings" (R. 2). Respondent does not err as to this conten-

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* Quoted from Mr. Justice Warren's dissent in *Barr* v. *Matteo*, 360 U. S. 564 (1959).

** P.22.

tion. It was rather the court below which invoked the section without specifically referring to it when it stated, "it was proper for the *News* to introduce reports of legislative and executive proceedings to show the 'privileged facts' that formed a basis for its comment" (P. 31). The court thus, must have referred to the privilege granted by § 74 of the New York Civil Rights Law.

Respondent maintains the only privilege claimed is that of fair comment. Petitioner recognizes the difficult distinction which may arise between an assertion of fact and comment upon fact. See Seelman, *The Law of Libel and Slander in the State of New York* (1941) pages 233-237. And while respondent could maintain that the libelous statements made about the petitioner were in the area of comment on his public position, and were therefore fair comment, the proof on the trial did not meet the standards outlined by the court when it cited the A.L.I. *Restatement of Torts* § 606 (P. 30). The record is bare of any proof of either an absolutely privileged occasion (see *Restatement, supra,* §§ 583-592) or of a conditionally privileged occasion (*Restatement, supra,* §§ 593-603). It is further bare of evidence of the truth of the facts alleged in the editorial.

The court below (P. 32) and respondent (R. 12) rely on *Kenna* v. *Daily Mirror, Inc.,* 250 App. Div. 625 (1st Dept.), aff'd 276 N. Y. 483 (1937), a case easily distinguished from the instant case for there, defendant's editorial referred to and contained comment on testimony at a hearing officially investigating the Magistrate's Court (see A.L.I. *Restatement of Torts,* § 588 and § 78 of the New York Civil Rights Law, P. 22).

POINT III

Plaintiff's case was overwhelmingly prejudiced by at least thirty-four questions asked on his cross-examination predicated on derogatory hearsay conclusions and not on fact in violation of state and federal law.

Respondent attempts to demonstrate the truth of the alleged libel by two quotations from Dr. Pauling's testimony indicating that the United States might safely refrain from nuclear testing (R. 2, 3). To this, respondent adds public positions taken by petitioner in opposition to nuclear testing, discussions with diplomats and Dr. Pauling's picketing of the White House (R. 3, 4).

Respondent further alludes to cross-examination of plaintiff as to his attitudes and opinions on the House Un-American Activities Committee and other agencies, scientists and senators (R. 5). In this posture, respondent asserts:

> "Petitioner's claim of error based on the contention that the trial court permitted a violation of the hearsay rule in admitting answers to some eight or nine questions in the four-day trial, devoted in most part to his own admissions of his controversial postures, brushes aside the overwhelming unobjected-to testimony in support of the reasonableness of respondent's editorial comments." (R. 5)

In this regard, petitioner asserts there were at least thirty-four highly improper and prejudicial questions asked of Dr. Pauling concerning the passport issue and the findings of the House Un-American Activities Committee and the Sub-committee on Internal Security of the Senate Judiciary Committee.* In demonstration of this,

* The questions were obviously put for the purpose of proving the truth of the hearsay conclusions. The Court below considered it "the serious issue in the case" (P. 36), that the trial court failed to give any instructions on the limited purpose for which a jury could consider such evidence. It nonetheless affirmed.

petitioner has appended Appendix C herewith setting forth such questions. Although not each question was met with an objection, there were sufficient objections to the various lines of questions—all overruled—which should have brought the issue to the trial court's attention.

Such hearsay conclusory evidence was erroneously admitted under New York law (P. 15-16) and in addition, the particular reference to the contents of congressional reports to prove their truth goes beyond the holding of any federal court of appeals (P. 16-17).

POINT IV

Proof of reliance did not meet the standard set by New York courts.

Respondent correctly states that the provisions of § 78 of the New York Civil Rights Law (P. 22) do not specify means of proof for mitigation of damages. *Varvaro* v. *American Agriculturist, Inc.*, 222 App. Div. 213, 217 (1st Dept. 1927) cited by respondent (R. 8) sets forth how such proof should be made.

> "The defendant has a right to prove the absence of malice in mitigation of the verdict, and to do this it is indispensable to prove that he believed and had some reason to believe, the charge to be true when it was made. There are but two conceivable modes of doing it: One: by proving that *he received such information from others as induced him to believe the charge* to be true; the other, by showing the existence of facts *within his knowledge* calculated to produce such a belief" (Emphasis supplied).

Nowhere in the record is the extensive cross-examination of plaintiff as to his beliefs and opinions tied up with defendant editorial writer's knowledge of these particular

opinions. The court below saw fit to comment on one such complaint.

"A possible chink in defendant's armor is the lack of particularized evidence that Maury, the author of the editorial, knew of this episode when he wrote the editorial." —Hardly one of the "two conceivable" modes of proof!

In fact, defendant's reliance on any specific documentary evidence was not brought out at the trial by the introduction into evidence of any such material whatsoever. Respondent avers:

> "Petitioner called Maury as his witness and had adequate opportunity to examine him in regard to the details of the contents of the clip files upon which he relied and his memory of the newspaper history of Pauling that he had followed down the years." (R. 8)

This would make it plaintiff's obligation to prove with particularity the defense of mitigation. Again, an incongruous proposition.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX C

Selected Questions Put to Plaintiff on Cross Examination

Q. Dr. Pauling, in 1952 on two occasions the State Department rejected your application for a passport, didn't it? (T. 103)

Q. You are not sure whether it was on one or two occasions that your application [for a passport] was rejected? (T. 103)

Q. Did Mrs. Shipley or some subordinates tell you that before the State Department would issue a passport they wanted to be satisfied as to your loyalty? (T. 106)

Q. Isn't it a fact, Dr. Pauling, when you did get the passport after you signed these papers that it was limited to travel in England and France? (T. 107)

Q. And did you follow the sensible course in this instance and address a petition to Congress asking Congress to abolish the House Un-American Activities Committee? (T. 228)

Q. And at the time you took this action which you have just described were you aware of the fact that during the course of its life the House Un-American Activities Committee had indeed exposed and identified organizations that were engaged in subversive activities? (T. 228)

Q. Well, did you follow the activities of this Committee [the House Committee] to some extent? (T. 228)

Q. Did you think the activities of this [the House Committee] Committee [229] were Un-American? (T. 228)

Q. Was it your desire too by having this Committee abolished prevent the identification and exposure of organizations that were engaged in subversive activities? (T. 228)

Q. Now, in connection with your efforts to have the Committee abolished, you resorted to the picket line, didn't you? (T. 230)

Appendix C.

Q. What relationship did the House Un-American Activities Committee and your picketing have with the peace walk? (T. 223)

Q. Is it the fact that in a large manner and to a large extent the Attorney General's conclusions in connection with the promulgation of those lists are based on evidence produced before the House Un-American Activities Committee? (T. 236)

Q. Was that [American Peace Crusades] organization the subject of inquiry by the House Un-American Activities Committee? (T. 237)

Q. Don't you know that that organization, and I am talking about the American Peace Crusades, was found to be subversive by the House Committee? (T. 237)

Q. Now, Doctor, you were questioned for two days before this Senate Committee on Internal Security. I am talking about the United States Senate. Were you not? You remember that, don't you? (T. 240)

Q. As long as he kept quiet and gave you an opportunity to talk he was a nice fellow? All right, we will get to that later. But during the three days you were on the stand didn't Senator Dodd tell you that the American Peace Crusade organization had been found to be subversive by the House Un-American Activities Committee? (T. 243)

Q. So we have it now that this American Peace Crusade, the difference is that the American Peace Crusade was found to be subversive by the House Committee but may not have been on the Attorney General's subversive list? Is that the point you are trying to make? (T. 244)

Q. While you were being interrogated before this Senate Internal Securities Committee, Senator Dodd, when he was questioning you about organizing this American Peace Crusade group, did he say to you that Dean Acheson, who was then Secretary of State, had denounced the group? (T. 245)

Appendix C.

Q. After your three days of testimony before the Senate Internal Security Committee did you make any individual efforts to ascertain were there organizations that you admitted membership in and were subversive according to the House Committee, did you make any efforts to ascertain the accuracy of those findings? (T. 246)

Q. Was it represented to you during that Senate hearing that the House Committee had found the American Peace Crusade organization to be a subversive? (T. 247)

Q. Well, you say in this case. While you were before that Senate Subcommittee you were questioned about a number of organizations that you had been or were a member of, were you not? (T. 247)

Q. And in connection with that big number were you told that some of those organizations had been found to be subversive by the House Un-American Affairs Committee? (T. 247-248)

Q. Now, will you identify for us those organizations which you were told by the Senate Sub-committee had been identified as subversive by the House Un-American Activities Committee? (T. 249)

Q. I don't want to put you to any great task, but when you were told by the Senate Subcommittee that organizations which you were a member of were found to be subversive by the House Un-American Activities Committee, did you deny knowledge of their subversity? (T. 249)

Q. I am not interested in your speculation, Doctor. Did you or didn't you deny knowledge of their subversity? (T. 249)

Q. And if the House Un-American Affairs Committee had in part based its conclusion of subversity on the ground that these organizations followed the Communist Party Line you would have disagreed violently with their conclusion, wouldn't you? (T. 249)

Q. Do you know that that [Committee for the Peaceful Alternative to the Atlantic Pact] was found to be sub-

versive by the House Un-American Activities Committee, don't you? (T. 250)

Q. Yes, that is what the record shows. Weren't you so [that the group was subversive] told by the Senate Committee when they were questioning you during the three days? (T. 251)

Q. . . . Again to be hypothetical, if the House Committee's conclusion of subversity was founded upon the fact that this organization had followed the Communist doctrine and the Communist Party line, would you have disagreed with the conclusion reached by the Committee? (T. 251)

Q. You were questioned about your support and sponsorship of this conference [Scientific and Cultural Conference for World Peace] by the Senate Committee? (T. 252)

Q. Were you told by Senator Dodd that this conference was communistic-dominated and controlled? (T. 252)

Q. Were you questioned about that [American Continental Congress for World Peace] before the Senate Committee? (T. 253)

Q. Were you told that that [American Continental Congress for World Peace] was cited by the House Committee as being subversive? (T. 253)